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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KIMBERLY KEMPTON et al., Plaintiffs and Appellants, v. BEN HARRIS et al., Defendants and Respondents; CAROLYN COOPER et al., Defendants and Appellants.	B210894 (Los Angeles County Super. Ct. No. BC363261)

APPEAL from a judgment and an orders of the Superior Court of Los Angeles County, Victor Chavez, Judge. Affirmed with directions.

Charles G. Kinney, in pro. per., and for Plaintiffs and Appellants.

Plotkin Marutani & Kaufman, Jay J. Plotkin, Nancy O. Marutani; Borton Petrini and Matthew J. Trostler for Defendants and Appellants.

Richardson & Fair, Manuel Dominguez and William O'Kelly for Defendants and Respondents Ben Harris, Jeffrey Harris and Judy Harris.

Karen Numme, in pro. per., for Defendant and Respondent.

INTRODUCTION

Plaintiffs Kimberly J. Kempton and Charles G. Kinney appeal from a judgment which found that defendants Carolyn Cooper, Michael Olivares, Ben Harris, Jeffrey Harris, Judy Harris, and Karen Numme were not liable for invasion of plaintiffs' privacy and which denied plaintiffs' request for injunctive relief under Code of Civil Procedure sections 526 and 527.6. We find that the trial court's rulings to exclude evidence were not an abuse of discretion. We conclude that the denial of plaintiffs' untimely request for special findings was not error, that the statement of decision was not improper, and that delay in issuing the statement of decision provides no ground for reversal. Plaintiffs have not shown that the trial court erroneously refused plaintiffs' proposed modification to an instruction on invasion of privacy. Plaintiffs have also failed to show error in alleged misstatements and omissions of fact and law in the statement of decision and in the judgment. We conclude that the trial court properly awarded attorney's fees as costs under Code of Civil Procedure section 527.6. We conclude that the judgment for defendants should be affirmed.

Carolyn Cooper and Michael Olivares cross-appealed from an order awarding attorney's fees to them pursuant to Code of Civil Procedure section 527.6, subdivision (i). We find that the trial court's apportionment of the award to reflect attorney's fees incurred in the statutory injunctive relief action, as authorized by section 527.6, subdivision (i) was not an abuse of discretion. We conclude that the order awarding attorney's fees should be affirmed.

FACTUAL AND PROCEDURAL HISTORY

Defendant Carolyn Cooper owned a house at 3531 Fernwood Avenue in the Silver Lake district of Los Angeles, where she had lived for 22 years. In October 2005, plaintiffs Kimberly Kempton and Charles Kinney purchased the house next door at 3525 Fernwood Avenue. Access from plaintiffs' garage to the nearest street, Cedar Lodge Terrace, crosses property at 1920 Cedar Lodge Terrace owned by defendants Jeffrey and Judy Harris. Some of the area in front of plaintiffs' garage door was under a 15-year easement deed granted by the Harrises in 1991 to the previous owners of 3525 Fernwood

for access to their garage. That easement expired on June 30, 2006. For the previous 19 years, the Harrises had placed their trash cans for pickup in the street adjacent to their yard and the easement area. They received no complaints from the people who owned the home that plaintiffs purchased.

A month before the easement was to expire on June 30, 2006, plaintiffs had their property lines surveyed. On June 17, 2006, plaintiffs sent a letter to the Harrises demanding that the Harrises quitclaim the property in the easement area in front of the garage to them, even though Kinney admitted that he did not believe that plaintiffs owned the easement area. Kinney and Kempton brought two prior lawsuits against these defendants. On June 19, 2006, plaintiffs sued Cooper, alleging that a wall Cooper built in 1991 encroached on plaintiffs' property, that a fence on Cedar Lodge Terrace was a nuisance, and that Cooper had trespassed on their property by removing wooden survey stakes located on plaintiffs' property. In June 2006, plaintiffs also sued the Harrises over the issues of the easement and the Harrises' fence along Cedar Lodge Terrace.

On December 11, 2006, plaintiffs filed the complaint initiating the present action against Carolyn Cooper, Ben Harris, Jeffrey Harris, and Judy Harris. Plaintiffs filed a first amended complaint on December 22, 2006, for invasion of privacy and harassment and for injunctive relief. The cause of action for invasion of privacy and harassment alleged that Jeffrey Harris poured an unknown liquid near, on, and into plaintiffs' garage, posted a sign on the Harrises' fence stating that the area had been illegally sprayed with chemicals (which plaintiffs allege referred to them), and, with Judy Harris, Ben Harris, and Cooper, invaded plaintiffs' privacy by looking into their garage with the use of a flashlight. The complaint alleged that Harris acted with malice when posting the sign because he had poured or would be pouring an unknown liquid near, on, and into plaintiffs' garage so that the public or their pets could see or come in contact with that liquid. The complaint alleged that on September 9, 2006, as Kempton was cleaning the liquid allegedly poured by Jeffrey Harris, Harris photographed Kempton in the garage, continued to photograph when Kempton asked him to stop, and refused to answer Kempton when she asked him why he was taking the photographs. The complaint

alleged that Harris placed surveillance cameras so as to view plaintiffs' garage, back yard, and back yard windows with the intent to invade plaintiffs' privacy. The complaint alleged that on September 22, 2006, Jeffrey Harris intentionally rammed plaintiffs' garage door, and on November 15, 2006, moved plaintiffs' black trash bin back from Cedar Lodge Terrace so it did not get picked up. The complaint alleged that defendants conspired with one another to harass and invade plaintiffs' privacy. The complaint also sought injunctive relief pursuant to Code of Civil Procedure section 526.[1]

The trial court granted motions for nonsuit of Michael Olivares and Karen Numme. Trial was bifurcated, with a jury trial on the invasion of privacy cause of action and a trial by the court on the claim for injunctive relief.

In the jury trial of this lawsuit, the evidence showed that in August 2006, someone left a beer bottle in the easement area and poured an unidentified liquid in that location, a sprayed stain damaged the Harrises' fence, and vegetation was killed in an area where the Harris's daughter and pets play. After a neighbors' dog became sick from being in that area, the Harrises posted a sign on the fence to warn people to keep their dogs away from the area. The Harrises also purchased a surveillance camera and placed it to be directed inside their yard; it was later moved to a tree and aimed at the Harris's driveway property. It was visible from the street. The camera later got wet from the sprinklers, shorted out, and ceased to function. The Harrises left it in place to deter further vandalism by plaintiffs. The Harrises posted a sign on the fence that a video system was operating in the area.

On September 5, 2006, Jeff Harris found some chemicals or "goop" on his property. He testified that he did not pour it there. Late in the day, about 10:00 or 11:00 p.m., he took a sample of the unidentified goop. Harris denied pouring anything into plaintiffs' garage and denied looking into their garage at that time. Four days later, on a Saturday, Jeff Harris saw Kempton in her garage, pouring something that leaked into the

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[1] Unless otherwise specified, statutes in this opinion will refer to the Code of Civil Procedure.

street. Kempton hid behind a shower curtain. The garage door was open. Harris got a camera and took a picture of what Kempton was doing.

On September 4, 2006, while walking on Cedar Lodge Terrace next to her house, Cooper observed white stripes marked on the Harrises' property. Cooper tried to determine what the stripes were marking and whether the stripes were lined up with her property lines or the Harrises' property lines. She was not sure what the white stripes were marking. She did not approach the door of plaintiffs' garage or attempt to look into their garage. She estimated that she looked for about 10 seconds before walking away. Kinney testified that he had painted a white line on the concrete approach to the driveway. Two nights later on September 6, 2006, Cooper was on Cedar Lodge Terrace talking with either Judy Harris or Karen Numme. Sensor lights came on at a triplex behind them, illuminating a large quantity of what Cooper described as "shiny goop," a shiny, honey-like substance. Cooper, Judy Harris, and Numme moved closer, and when the Harrises' son Ben came outside, they asked him to get a flashlight. It appeared to Cooper that the goop was coming from plaintiffs' yard onto the Harrises' property, and some was possibly coming from under plaintiffs' garage. To Cooper, it appeared that the amber-colored, clear, thick liquid might have been a large quantity of motor oil. On this evening of September 6, 2006, Cooper did not approach or touch plaintiffs' garage door and did not look inside the garage through or under the garage door. She was on the Harrises's property, focused on looking at the goop that was on the Harrises' property

By special verdict, the jury unanimously found that defendants did not intentionally invade plaintiffs' privacy. After a trial by the court on plaintiffs' claim for injunctive relief, the trial court denied plaintiffs' requests for injunctive relief under sections 526 and 527.6. Judgment was entered in favor of defendants Carolyn Cooper, Michael Olivares, Karen Numme, Jeffrey Harris, Judy Harris, and Ben Harris and against plaintiffs. The trial court determined that each defendant was a prevailing party, and that defendants were to recover costs of suit.

On August 7, 2008, Cooper and Olivares moved for an award of attorney's fees of $161,515 pursuant to sections 527.6, subdivision (i) and 1033.5, subdivisions (a)(10) and

(c)(5). On August 8, 2008, Ben Harris, Jeffrey Harris, and Judy Harris moved for an award of attorney's fees of $38,100 pursuant to section 527.6, subdivision (i). Plaintiffs filed opposition and motions to strike or to tax costs as to both attorney's fee motions.

On September 18, 2008, plaintiffs Kempton and Kinney filed a timely notice of appeal from the judgment.

On September 25, 2008, the trial court determined that the action proceeded in part pursuant to section 527.6, granted the motion of Cooper and Olivares for attorney's fees and costs as prevailing parties, and awarded Cooper and Olivares attorney's fees in the amount of $50,000 and costs of $7,407.29.

On September 29, 2008, plaintiffs filed an amended notice of appeal from the post-judgment orders awarding attorney's fees to Cooper.

On October 1, 2008, the trial court granted the motion for attorney's fees of Ben Harris, Jeffrey Harris, and Judy Harris pursuant to section 527.6, subdivision (i), in the amount of $10,000.

On October 6, 2008, plaintiffs filed a second amended notice of appeal from the post judgment orders awarding attorney's fees to the Harris defendants.

On October 8, 2008, defendants Cooper and Olivares filed a notice of cross-appeal.

ISSUES

Plaintiffs Kempton and Kinney claim on appeal that:

1. The trial court improperly excluded evidence;

2. The trial court erroneously refused plaintiffs' requested special jury findings;

3. The trial court improperly delayed issuing a statement of decision;

4. The trial court erroneously refused plaintiffs' requested modifications of the jury instruction on intrusion into private affairs;

5. The trial court made rulings and made its decision based on incorrect statements of the law; and

6. The award of attorney's fees as costs under section 527.6 was improper.

In their cross appeal, Cooper and Olivares claim that the trial court abused its discretion by apportioning attorney's fees, when the same issues plaintiffs raised in their invasion of privacy claim (in which no attorney's fee award was authorized) formed the basis of the harassment claim (in which a statutory provision authorized an award of attorney's fees to the prevailing party).

Defendants Numme and Cooper and Olivares have made motions for sanctions against plaintiffs for taking a frivolous appeal.

DISCUSSION

I. *Appeal of Plaintiffs Kempton and Kinney*

A. *Plaintiffs Have Forfeited Any Claim That Substantial Evidence Does Not Support the Judgment*

To the extent that plaintiffs claim that substantial evidence does not support the judgment, their failure to set forth in the brief all—indeed, any—material evidence supporting the judgment forfeits the claim of error on appeal. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Byars v. SCME Mortgage Bankers, Inc*. (2003) 109 Cal.App.4th 1134, 1140-1141.)

B. *The Rulings to Exclude Evidence Were Not an Abuse of Discretion*

Plaintiffs claim the trial court improperly excluded evidence they offered at trial.

The abuse of discretion standard governs review of a trial court's ruling to exclude evidence under Evidence Code section 352 because it caused undue consumption of time, undue prejudice, confusion of issues, or misleading of the jury. (*Austin B. v. Escondido Union School Dist*. (2007) 149 Cal.App.4th 860, 885.) This court does not substitute its judgment for that of the trial court, and may grant relief only when the asserted abuse of the discretion conferred by Evidence Code section 352 constitutes a miscarriage of justice. (*Ajaxo Inc. v. E*Trade Group Inc*. (2005) 135 Cal.App.4th 21, 44-45.)

First, plaintiffs claim error because the trial court refused to allow plaintiffs to play a videotape after Jeff Harris testified that he picked up a sample of the "goop" on September 5, 2006, and did not pour anything into plaintiffs' garage. Before that testimony, plaintiffs' offer of proof was that the videotape showed Jeff Harris at 12:45

a.m. "seemingly pouring some goop on the property." Plaintiffs questioned how Harris obtained a sample when nobody was there from 8:00 p.m. until Harris appeared. Defendant Harris's attorney stated that Harris would testify that Harris went to the area to take a sample; plaintiffs' interpretation was that Harris was pouring something. Harris's attorney argued, however, that the video did not show any of it. The trial court sustained the objection to the video, which would take six hours to play to the jury, as involving undue consumption of time. On appeal plaintiffs argue that Evidence Code section 352 did not apply since the tape could have been played fast forward for 20 minutes. Plaintiffs did not present this option to the trial court; there Kinney argued that he was entitled to show six hours of videotape to prove that nobody but Harris walked to the location. Aside from the fact that it was questionable whether the videotape would prove what it was supposed to prove, the trial court was well within its discretion in refusing to admit a six-hour videotape because its probative value was substantially outweighed by the probability that its admission would necessitate undue consumption of time (Evid. Code, § 352). We find no abuse of discretion.

Second, plaintiffs claim error because the trial court excluded Kinney's testimony on removal of survey stakes by Cooper and Harris, which would have shown that Cooper and Harris reached across plaintiffs' property line and thus committed a physical intrusion. The complaint did not allege that defendants removed survey stakes from plaintiffs' property. Removal of survey stakes is not an invasion of privacy and thus had no relevance to plaintiffs' cause of action. Finally, the removal of the stakes was litigated in a previous action for trespass, *Kempton v. Cooper* (Superior Ct., Los Angeles County, 2008, No. BC354136), and the jury found against plaintiffs on the trespass cause of action. The judgment was affirmed on appeal in the nonpublished opinion, *Kempton v. Cooper* (B208943) filed on June 4, 2009. Plaintiffs were collaterally estopped from relitigating the issue in the trial court, and the exclusion of Kinney's testimony on removal of survey stakes was not an abuse of discretion.

C. *The Denial of Plaintiffs' Untimely Request for Special Findings Was Not Error*

Plaintiffs claim on appeal that the trial court erroneously refused to submit plaintiffs' special findings to the jury.

California Rules of Court, rule 3.1580 states: "Whenever a party desires special findings by a jury, the party must, before argument, unless otherwise ordered, present to the judge in writing the issues of questions of fact on which the findings are requested, in proper form for submission to the jury, and serve copies on all other parties."

Jury argument began on March 27, 2008, and the matter was submitted to the jury on that date. On March 26, 2008, plaintiffs filed "Plaintiffs' Special Findings for the Jury" containing 20 questions with the Los Angeles County Superior Court Clerk, but did not "present to the judge" those documents. On March 28, 2008, defense counsel objected to plaintiffs' special findings for the jury as untimely served. Thus plaintiffs' special findings for the jury were not timely presented to the judge. Moreover, at the time of the March 28, 2008, hearing, plaintiffs had reduced the number of requested special findings from 20 to 10. That new document requesting special findings was first presented to the judge on March 28, 2008. It was therefore untimely and the trial court properly denied the request for special findings. Moreover, plaintiffs have not placed their request for special findings in the record on appeal, precluding review by this court.

D. *The Statement of Decision Was Not Improper and Delay in Issuing the Statement of Decision Provides No Ground for Reversal*

Plaintiffs claim that the trial court's statement of decision was improper and was delayed.

1. *Plaintiffs Have Not Shown That the Statement of Decision Was Improper*

Plaintiffs claim that after their March 26, 2008, request for a statement of decision in their claim for injunctive relief, and after the trial court heard evidence and decided those matters on March 28, 2008, the trial court failed to make required findings as to the factual and legal basis for its decision and failed to have a timely hearing. Plaintiffs claim that the trial court failed to comply with numerous requirements in California Rules of Court, rule 3.1590. California Rules of Court, former rule 3.1590(k), however, states:

"This rule does not apply if the trial was completed within one day." Trial of injunctive relief issues was completed on March 28, 2008. Therefore the requirements in rule 3.1590 did not apply.

2. *A Delayed Statement of Decision Provides No Grounds for Reversal*

The plaintiffs also claim that the trial court failed to make a final decision within 90 days after taking the matter under submission on March 28, 2008, and entered its statement of decision three months late, on July 10, 2008.

Plaintiffs claim that by failing to make a final decision within 90 days after taking the matter under submission, the trial court violated California Constitution, article 6, section 19, stating, in relevant part: "A judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." Article 6, section 19 does not require a judge to decide a case within any specified time after submission; instead this constitutional provision imposes a penalty upon the judge for failing to decide within the time limited, and enforcement of this provision results only in personal inconvenience to the judge. (*Wyatt v. Arnot* (1907) 7 Cal.App. 221, 228.) "[T]he matter of the *time* when a judge may decide a case submitted to him for decision is as much a matter of judicial discretion and judgment as the matter of *how* he may decide it." (*Ibid*.; see also *Nunn v. State of California* (1984) 35 Cal.3d 616, 623-624.)

Plaintiffs cite the similar requirement in Government Code section 68210,[2] and *Hassanally v. Firestone* (1996) 51 Cal.App.4th 1241. *Hassanally* reiterates that the penalty for failing to decide a case within 90 days of the date it was submitted is the withholding of salary until the matter is decided. (*Id*. at p. 1244.) Failure to decide the case within this time period provides no basis for a finding that the decision was erroneous or requires reversal. (*Id*. at p. 1245.) Plaintiffs cite several authorities holding

[2] Government Code section 68210 states: "No judge of a court of record shall receive his salary unless he shall make and subscribe before an officer entitled to administer oaths, an affidavit stating that no cause before him remains pending and undetermined for 90 days after it has been submitted for decision."

that a trial court's erroneous failure or refusal to render a statement of decision after a timely request may be grounds for reversal. (*Gruendl v. Oewel Partnership, Inc*. (1997) 55 Cal.App.4th 654, 661; *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 127, 129; *Miramar Hotel Corp. v. Frank B. Hall & Co*. (1985) 163 Cal.App.3d 1126, 1129; *In re Marriage of Davis* (1983) 141 Cal.App.3d 71, 75.) None of these cases, however, hold that reversal may be had for delayed issuance of a statement of decision.

E. *Plaintiffs Have Not Shown That the Trial Court Erroneously Refused to Deliver Plaintiffs' Proposed Modifications to the CACI No. 1800 Instruction*

Plaintiffs claim that the trial court erroneously refused to deliver jury instructions and verdict forms they requested.

Plaintiffs claim that they requested changed language in the CACI No. 1800 instruction. They make no citation to the record showing that request. A party is automatically deemed to have excepted to "an order . . . giving an instruction, refusing to give an instruction, or modifying an instruction requested[.]" (Code Civ. Proc., § 647.) However, a party may not complain on appeal that an instruction correct in law is too general or incomplete unless that party requested an additional or qualifying instruction. Only where the instruction as given incorrectly stated the law may a party who failed to object be heard to complain of error on appeal. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 949, disapproved on unrelated ground, *White v. UltraMar, Inc.* (1992) 21 Cal.4th 563, 575, fn. 4; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 334.) Plaintiffs' failure to show that they requested changes to the CACI No. 1800 instruction is ground for forfeiture of their claim of error on appeal. (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520-521.)

Even assuming plaintiffs properly requested changes to the CACI No. 1800 instruction, however, we conclude there was no error in the refusal of those proposed changes. Plaintiffs claim the removal by Cooper and Harris of survey stakes from their property in June 2006 intentionally intruded upon plaintiffs' property, intruded into plaintiffs' affairs and concerns, and intruded into their solitude. As plaintiff admits, the trial court sustained objections to plaintiff Kinney's testimony that Cooper and Harris

admitted removing survey stakes. We have found, *ante*, that the exclusion of that evidence was not an abuse of discretion. The complaint did not allege that defendants invaded plaintiffs' privacy by removing survey stakes from their property. Where the pleading and the evidence do not support the delivery of an instruction, refusal to deliver that proposed instruction is not error. (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1107.)

The trial court gave the jury the following instruction on invasion of privacy:

"To establish [their claim that defendants violated their right to privacy], Charles Kinney and Kimberly Kempton must each prove all of the following:

"1. That each had a reasonable expectation of privacy while inside their garage with the door closed.

"2. That each defendant intentionally intruded upon [plaintiffs] while they were in their garage with the door closed[.]"

Plaintiffs claim there can be intrusions onto their property and into their affairs, concerns, or solitude. Therefore, plaintiffs argue, the instructions should have stated that to establish their claim that defendants violated their right of privacy, plaintiffs had to prove:

1. That each had a reasonable expectation of privacy while on their property, wanted a reasonable expectation of privacy in their affairs and concerns, and had a reasonable expectation of solitude;

2. That each defendant intentionally intruded upon plaintiffs' property, upon plaintiffs' affairs and concerns, and upon plaintiffs' solitude.

Plaintiffs cite *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200. Of the four privacy torts, "the tort of intrusion into private places, conversations or matter . . . encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized[.]" (*Id.* at pp. 230-231.) "[T]he action for intrusion has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." (*Id.* at p. 231.)

Plaintiffs argue that their proposed instructions should have been delivered because they alleged several instances of intrusions by defendants. First, plaintiff Kempton testified that on September 4, 2006, she was inside her garage with the garage door closed, looked through a knothole, and saw the face of defendant Cooper less than six inches away. Second, plaintiff Kempton testified that that in late August 2006, she noticed what looked like a surveillance camera pointing toward her garage from the Harris property. Third, plaintiff Kempton testified that she observed a substance poured into her garage onto its floor and outside the garage. Regarding these alleged intrusions, the instruction delivered to the jury correctly stated the law.

Fourth, to protect her property from vandalism, plaintiff Kempton testified that she installed a surveillance camera to monitor the area outside plaintiffs' garage. It is unclear what relevance this evidence has to plaintiffs' claim for invasion of privacy. In any case this evidence does not support any of the modifications to the instructions requested by plaintiff.

Fifth, plaintiffs cite videotape of Jeff and Judy Harris ramming plaintiffs' garage door with their automobile; of Jeff Harris pushing back plaintiffs' trash can so it would not be picked up; of Cooper, Judy Harris, Ben Harris, and Numme leaning over the property line to look under plaintiffs' garage door at night with a flashlight. The videotapes do not provide evidence supporting delivery of the modifications to the instructions requested by plaintiffs.

Sixth, plaintiffs cite evidence of Jeff Harris throwing ice at Kinney and threatening him when Kinney was standing on Cedar Lake Terrace. Plaintiffs cite a declaration of diligence regarding service of summons and complaint on Ben Harris by Keith Waggoner. This was not evidence at trial and was not heard by the jury. It does not provide evidence supporting delivery of any of the modifications to the instructions which plaintiffs requested.

We conclude that plaintiffs have not shown error in the trial court's refusal to modify the instruction delivered to the jury.

F. *Plaintiffs Fail to Show Error in Alleged Misstatements and Omissions of Fact and Law in the Statement of Decision and in the Judgment*

Plaintiffs claim that the trial court based rulings and part of its decision on incorrect statements of the law.

First, plaintiffs cite error in the statement of decision when it stated that defendant Harrises own the land between plaintiffs' garage and Cedar Lodge Terrace. Plaintiffs claim this ignored the publicly owned roadway, sidewalk, and unpaved area. Plaintiffs fail to show how this alleged erroneous statement of fact has relevance to issues in this lawsuit.

Second, plaintiffs argue that the trial court made a misstatement of law by ignoring that fences owned by Cooper and Harris are obstructing the public sidewalk and creating a public nuisance per se. Plaintiffs further observe that the statement of decision and judgment misstate the law by not mentioning the consequences of Cooper's and the Harrises's maintenance of public nuisances per se. Plaintiffs fail to show any relevance to this lawsuit of this omitted matter from the statement of decision.

G. *The Trial Court Properly Awarded Attorney's Fees Under Section 527.6*

Plaintiffs claim the trial court erroneously awarded attorney's fees under section 527.6, subdivision (i). Plaintiffs argue that section 527.6 was never part of this case.

The complaint requested injunctive relief pursuant to section 526, which has no attorney fee provision. Subsequently, however, plaintiffs made numerous claims for injunctive relief based on section 527.6, which does have an attorney fee provision.

Plaintiffs' motion in limine filed January 7, 2008, stated that plaintiffs had a legal and enforceable right of privacy, and could sue for an injunction to stop defendants' misbehavior, citing sections 526, 527, and 527.6.

Plaintiffs' motion in limine filed February 1, 2008, again stated that plaintiffs could sue for money damages and/or for an injunction to stop defendants' misbehavior, citing sections 526, 527, and 527.6.

On February 8, 2008, in a letter to counsel for defendants Cooper and Olivares, plaintiffs stated: "In the operative complaint, there is a paragraph requesting injunctive relief. CCP Sec. 527.6 could be considered to apply to that paragraph."

Plaintiffs' February 11, 2008, supplemental trial brief stated: "In the operative complaint, there are facts supporting 4 torts and injunctive relief based on 2 different statutes. [¶] . . . [¶] As for injunctive relief, the facts support relief under: (a) harassment via CCP Sec. 527.6; and (b) abatement of the nuisance via Civil Code Sec. 3501(2) and CCP Sec. 526." The supplemental trial brief again cites section 527.6 in arguing that harassment can include infliction of emotional distress. "A victim of harassment can bring a 'tort' action based on intentional infliction of emotional distress or on an invasion of privacy and, where great or irreparable injury is threatened, may obtain an injunction under CCP Sec. 527.6." The supplemental brief also argues that in addition to a tort remedy for harassment, the law allows an additional remedy to prevent the continuing course of conduct. "That additional remedy is the availability of an injunction under CCP Sec. 527.6 . . . ."

In their February 11, 2008, opposition to Cooper's motion in limine, plaintiffs described the complaint as containing facts supporting four torts and injunctive relief based on two statutes. "As for injunctive relief, the facts support relief under: (a) harassment via CCP Sec. 527.6; and (b) abatement of the nuisance via Civil Code Sec. 3501(2) and CCP Sec. 526." It further states: "A victim of harassment can bring a 'tort' action based on intentional infliction of emotional distress or on invasion of privacy and, where great or irreparable injury is threatened, may obtain an injunction under CCP Sec. 527.6." Finally, it states that the additional remedy to prevent a continuing course of conduct of harassment "is the availability of an injunction under CCP Sec. 527.6[.]"

In a March 21, 2008, response to Cooper's trial brief (which addressed issues raised by plaintiffs' briefs and in limine pleadings, including, inter alia, section 527.6), plaintiffs alleged that they were "entitled to injunctive relief under several statutes . . . 527.6 (harassment)[.]"

Thus plaintiffs did rely on section 527.6 as a statutory basis for their claims for injunctive relief from defendants' alleged harassment.

Plaintiffs argue that section 527.6, subdivision (m) requires mandatory use by plaintiffs of forms and instructions promulgated by the Judicial Council, and that because plaintiffs did not use those mandatory forms, the matter was not prosecuted under section 527.6. Plaintiffs failure to use mandatory forms, however, is a defense available to defendant, not to plaintiffs. Whether plaintiff did or did not use mandatory forms did not affect the trial court's jurisdiction to rule on the request for injunctive relief pursuant to section 527.6. (*Adler v. Vaicius* (1993) 21 Cal.App.4th 1770, 1776.) Having claimed relief pursuant to section 527.6 and failed to obtain that relief, plaintiff is estopped from claiming that section 527.6 does not apply.

We reject the argument that the trial court erroneously awarded attorney's fees as costs pursuant to section 527.6, subdivision (i).

H. Conclusion

We conclude that plaintiffs' claims on appeal lack merit, and that the judgment for defendants should be affirmed.

II. *Cross-Appeal of Cooper and Olivares*

A. *Apportionment of Attorney's Fees Was Not an Abuse of Discretion*

Cooper and Olivares claim that the trial court abused its discretion by apportioning attorneys' fees and limiting the attorney's fee award to fees incurred in the injunctive relief action, because all fees were incurred for representation on issues common to both the claim for which fees are recoverable (injunctive relief pursuant to section 527.6) and the claim for which attorney's fees are not allowed (invasion of privacy).

No award of attorney's fees incurred is available in an invasion of privacy action. In an action for injunctive relief pursuant to section 527.6, however, subdivision (i)[3] authorizes an award of attorney's fees to the prevailing party.

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[3] Section 527.6, subdivision (i) states: "The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any."

Pursuant to section 527.6, subdivision (i), Cooper and Olivares requested $161,515 in attorney's fees. The trial court awarded $50,000 in attorney's fees.

The decision whether to award attorney's fees to a defendant as prevailing party under section 527.6, subdivision (i) is a matter committed to the discretion of the trial court. (*Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 802.)

"A litigant may not increase his recovery of attorney's fees by joining a cause of action in which attorney's fees are not recoverable to one in which an award is proper." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) However, "[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Id*. at pp. 129-130.) Where attorney's fees are authorized for some causes of action but not for others, allocation of attorney's fees is a matter within the trial court's discretion. Such discretion is abused only when the trial court's ruling exceeds the bounds of reason when all circumstances before the court are considered. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 555.)

A person who has suffered harassment—"unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose" and which "would cause a reasonable person to suffer substantial emotional distress" and which does "actually cause substantial emotional distress to the plaintiff"—may seek a temporary restraining order and an injunction prohibiting harassment as provided in section 527.6. (§ 527.6, subds. (a) and (b).) For purposes of section 527.6, "unlawful violence" is assault, battery, or stalking as prohibited in Penal Code section 646.9. (§ 527.6, subd. (b)(1)) "Credible threat of violence" is "a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose." (*Id*. at subd. (b)(2).) "Course of conduct" is "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an employee during hours of employment, making harassing

telephone calls to an employee, or sending correspondence to an employee by any means[.]" (*Id*. at subd. (b)(3).)

Thus the conduct defined as harassment providing a basis for injunctive relief pursuant to section 527.6 differs from that which provides a basis for tort recovery for invasion of privacy. Although some of the same conduct which plaintiffs alleged invaded their privacy also fit within the definition of harassment, those two kinds of conduct were not the same. Moreover, plaintiffs did not originally seek injunctive relief pursuant to section 527.6; they did not claim that relief until January of 2008, more than a year after the filing of their complaint and approximately three months before the trial in this matter began. Thus a considerable portion of attorney's fees were incurred due to representation before section 527.6 became an issue in the case. We conclude that the trial court's apportionment of attorney's fees was not an abuse of discretion.

B. *Defendants Are Entitled to Attorney's Fees on Appeal*

Attorney's fees, if recoverable pursuant either to statute or the parties' agreement, are available for services at trial and on appeal. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 637; accord *Russell v. Thermalito Union School Dist.* (1981) 115 Cal.App.3d 880.) Appellate courts have consistently permitted a successful party to recover attorney fees incurred on appeal when a statute expressly permits such an award in the trial court. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) This court orders the award of statutory attorney's fees on appeal to defendants Carolyn Cooper and Michael Olivares and to defendants Ben Harris, Jeffrey Harris, and Judy Harris. We remand the matter to the trial court for a determination of the amount of that statutory attorney's fee award.

III. *The Motion for Sanctions on Appeal Is Denied*

Defendants Karen Numme, and Carolyn Cooper and Michael Olivares, make motions that this court impose sanctions on plaintiffs and appellants Kimberly Kempton and Charles Kinney for having taken a frivolous appeal.

California Rules of Court, rule 8.276(a)(1) authorizes this court to impose sanctions on a party or an attorney for "[t]aking a frivolous appeal or appealing solely to cause delay[.]" In general, "an appeal should be held to be frivolous only when it is

prosecuted for an improper motive— to harass the respondent or delay the effect of an adverse judgment—-or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation]." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

That this court has concluded that the claims of plaintiffs and appellants lack merit does not make the appeal sanctionable. (*In re Marriage of Flaherty, supra*, 31 Cal.3d at p. 650.) We do not find that this appeal, although without merit, is "indisputably meritless," that the appeal is one which " 'any reasonable attorney would agree is totally and completely without merit,' " (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010) or that it was so obviously meritless as to establish that it was filed for an improper purpose (*McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 229). We therefore deny the motions for sanctions.

DISPOSITION

The motions for sanctions on appeal are denied. The judgment is affirmed. The orders awarding attorney's fees are affirmed. The matter is remanded to the trial court for a determination of the amount of statutory attorney's fees on appeal to be awarded to defendants Carolyn Cooper and Michael Olivares and to Ben Harris, Jeffrey Harris, and Judy Harris. Costs on appeal are awarded to defendants Carolyn Cooper and Michael Olivares, to Ben Harris, Jeffrey Harris, and Judy Harris, and to Karen Numme.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.